NO. 20300

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

KIDDIE RIDES, INC., a
Colorado corporation,

Appellant,

-vs-

SOUTHLAND ENGINEERING, INC., a
California corporation,

Appellee.

APPELLANT'S OPENING BRIEF

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I

STATEMENT OF JURISDICTION

The jurisdiction of the District Court was invoked upon the basis of Title 28, United States Code, Annotated, Sections 1332a1 and 1332c. Appellant, KIDDIE RIDES, INC., is a Colorado corporation, and the Appellee, SOUTHLAND ENGINEERING, INC., is a California corporation. The amount in controversy

exceeded the sum of Ten Thousand ($10,000.00) Dollars, to-wit, a claim by the plaintiff against the defendant in the sum of Nineteen Thousand Nine Hundred Fifty ($19,500.00) Dollars. The Complaint for an Accounting and for Money Due and Owing made the substance of allegations of jurisdiction in Paragraph I on page 1 of said Complaint; such matters were agreed to and District Court jurisdiction was stipulated in the Pretrial Conference ordered in Paragraph II thereof. The Trial Court made the findings sufficient to substantiate the claim of jurisdiction in the Findings of Fact, Paragraph 2.

This Honorable Court of Appeals has jurisdiction under 28 U.S. Code, Section 1291, enabling it to review the final judgment entered against the plaintiff below. For the sake of convenience hereinafter, the plaintiff below will be referred to as "plaintiff" and the defendant below will be referred to as "defendant".

II

STATEMENT OF THE CASE

On November 15, 1961, plaintiff and defendant executed a written Agreement wherein plaintiff was

granted a fifteen-state exclusive franchise to use, sell and merchandise certain children's rides manufactured by defendant. (Finding of Fact No. 8; plaintiff's Exhibit No. 7). Prior to November 15, 1961, defendant had a Franchise Agreement with another company, known as PALOMINO TRAILS COMPANY (hereinafter referred to as PALOMINO), concerning the same subject matter (Finding of Fact 4; plaintiff's Exhibit 2). PALOMINO had made a cash deposit of $25,000.00 under the Agreement, and in November, 1961, $19,950.00 of that deposit remained as a credit (Finding of Fact 6). On November 15, 1961, the agreement between PALOMINO and defendant was terminated by a written mutual agreement between those parties (Finding of Fact 7; plaintiff's Exhibit No. 6). In that same Agreement of Termination, plaintiff acquiesced in the termination, paid the sum of $19,950 to PALOMINO, and received a credit to plaintiff from defendant in the sum of the amount paid for the deposit, to-wit, $19,950. Page 4 of the Agreement of Termination, which is plaintiff's Exhibit No. 6, stated in part "Southland Engineering, Inc. does hereby acknowledge that it has on deposit the sum of $19,950.00 which has hereinabove been

released by PALOMINO, and which deposit shall be credited to the benefit of KIDDIE RIDES, INC., a Colorado corporation".

On November 15, 1961, the Franchise Agreement between plaintiff and defendant, executed at the same time as the Termination Agreement, granted plaintiff the right to a 15-state exclusive franchise to use, sell and merchandise the children's ride units manufactured by the defendants. The Agreement stated in part as follows:

> "The total purchase price for each unit shall be the sum of $1,450.00 . . . Southland hereby agrees that it will give Kiddie a credit of $250 per unit on the first 80 units (exclusive of the 100 units heretofore ordered) sold under this Agreement, until the total sum of $19,950 has been credited to Kiddie . . . Commencing January 1, 1962, Kiddie will place a firm order with Southland for not less than 25 units for each calendar month, or a total of 300 units per calendar year; should Kiddie fail or refuse to order said 25 units per month, or 300 units per calendar year, then and in that

> event, Southland shall have the right to cancel this exclusive Franchise Agreement to the territory and grant a similar exclusive right to any other person, firm or corporation. Prior to any termination aforesaid, Southland shall give Kiddie written notice setting forth the default at such time by Kiddie, and Kiddie shall have 30 days after receipt of same within which to cure said default. If Kiddie fails to cure said default within said 30-day period, then Southland may terminate this Agreement as aforesaid. If this Agreement be terminated for any cause whatsoever, all orders placed by Kiddie prior thereto shall be filled by Southland. It is specifically agreed by and between the parties hereto that Kiddie shall not be obligated to place orders for units as aforesaid, but upon its failure to do so, Southland may terminate this Agreement as herein provided".

The Agreement did not provide for the disposition of the $19,950.00 deposit in the event of

termination.

Between November 15, 1961, and February, 1962, plaintiff did take delivery and pay the full purchase price ($145,000) for 100 units ordered by it pursuant to the contract (Finding of Fact No. 9). After plaintiff had ordered, received and paid for the first 100 units, it did not place any further orders, and pursuant to the rights of the contract, defendant terminated the exclusive Franchise Agreement by sending a Notice of Termination which was accepted by plaintiff (Finding of Fact 10; plaintiff's Exhibit 9). The Notice of Termination, although dated February 1, 1962, actually was sent in the latter part of April, 1962 (Finding of Fact 10).

After the termination of the Agreement, plaintiff continued to send further correspondence to defendant, requesting a further Franchise Agreement to give plaintiff the opportunity of recovering the deposit of $19,950. As a culmination of the exchance of correspondence, a further Franchise Agreement, dated May 31, 1962, was granted by the defendant, giving plaintiff the right to sell in Texas and Arizona

at a special discount price of $1,245.00, which price reflected the credit or discount of $250.00. In that Franchise Agreement defendant further agreed to remit to plaintiff the sum of $250.00, or the difference between the selling price and $1245.00, whichever was greater, in all direct sales made by the defendant in Texas and Arizona. That Franchise Agreement was for a term of 18 months, or until plaintiff had recovered a full credit of $20,000.00, whichever occurred first (Finding of Fact 11; plaintiff's Exhibits 10, 11, 12, 13). During the period of the Franchsie Agreement dated May 31, 1962, defendant did sell three units, and stipulated in open court that it did owe plaintiff the sum of $750.00 at the rate of $250.00 for each of said units (Finding of Fact 12; plaintiff's Exhibit 15).

Plaintiff filed the action below to recover the$19,950.00. The Trial Court found that plaintiff had fully performed each and everything incumbent upon it to be performed under the terms of its Agreement with the defendant, and that plaintiff was not in default of any of its contractual duties or obligations, except that plaintiff did not qualify

for the credits set out in the November 15, 1961 Agreement (Finding of Fact 9, Paragraph 2).

III

SPECIFICATION OF ERRORS

Plaintiff asserts that the District Court committed error as follows:

1. Although the Court found that the sum of $19,950.00 was credited by defendant to the benefit of plaintiff, and that plaintiff had performed each and everything incumbent upon it to be performed, under the terms of its Agreement, and was not in default of its contractual duties or obligations, the Court erred in finding that plaintiff had the burden of proving defendant did not suffer damages less than $19,950.00;

2. The District Court erred in concluding that based on the Findings of Fact plaintiff failed to show it was entitled to any part or portion of the $19,950.00 (except the $750.00 stipulated to by the defendant);

3. The Court erred in concluding that plaintiff's right in equity to recover the $19,950.00 was conditioned on performance of acts not required by

contract;

4. The Court erred in holding that defendant was not unjustly enriched in failing to give plaintiff any portion of the $19,950.00, rather than the sum of $750.00;

5. The Court misconstrued and misapplied the holdings and the rationale of the California cases cited in support of the Court's Conclusions of Law,No.3, to-wit, Major Blakeney Corporation v. Jenkins, 121 Cal. App 2d 325, and Baffa v. Johnson, 35 Cal 2d 36, that under the Findings of Fact plaintiff was entitled to a Judgment for the $19,950.00 held for plaintiff's benefit by defendant, and that the Conclusions of Law were contradictory and contrary to the results required by the Findings of Fact.

IV

SUMMARY OF ARGUMENT

A. Principles of equity imply a promise to return monies had and received.

B. An implied agreement of the contract between the parties was that defendant would repay the deposit.

C. Allowing defendant to retain the deposit of $19,950.00 would be to unjustly enrich him.

D. The Trial Court erroneously interpreted and applied the holdings in <u>Major Blakeney Corp.v. Jenkins,</u> 121 Cal. App. 2d 325 263 P 2d 655; and <u>Baffa v. Johnson</u>, 35 Cal. 2d 36; 216 P 2d 13.

V

ARGUMENT

A. <u>Principles of Equity Imply a Promise to Return Monies Had and Received.</u>

by PALOMINO, and which deposit would be credited to the benefit of plaintiff . . ."

The action for money had and received may be maintained whenever an equity or legal right arises from the circumstances that one person has money which he ought to pay to another. In such a case the law raises a promise on the part of the receiver of the money that he will pay it to the person entitled thereto, and that, too, without any previous request.

Mahony v. Standard Gas Engine Co., 187 Cal. 399; 202 P 146.

Where the parties by mutual consent rescinded and cancelled their contract, there was a duty to repay money received thereunder. Upon failure to do so, the person holding the money is in the position of having money in his hands for the use and benefit of another, which as such may be recovered under a common count for money had and received.

See Lubeck's Investment Company v. Voris, 68 Cal. App 652; 229 P 1025.

In the instant case, plaintiff was under no

Generally, when one person has in his possession money, which in equity and good conscience ought to be repaid to another, an equitable action for monies had and received may be maintained.

> Philpott v. Superior Court, 1 Cal. 2d 512 36 P 2d, 636; See also Long-Way v. Newberry 13 Cal. 2d 603 91 P 2d 110; Fontaine v. Lacassie, 36 Cal. App. 175, 171 P 812.

> "Where the defendant consents or agrees to appropriate money in his hands belonging to another to the payment of the plaintiff at the owner's request, an action for money had and received will lie."
>
> > Briggs v. Marcus-Lesoine, Inc., 3 Cal. App. 2d 207; 39 P 2d 442.

In the instant case, defendant below consented to appropriate the money in his hands, to-wit, the $19,950.00 deposit paid to him by PALOMINO to the payment of plaintiff under its new Agreement with the defendant. Finding of Fact No. 7 provides in part that:

> "The defendant did acknowledge it had on deposit the sum of $19,950.00 which was released

obligation to order the second 80 units to which the credit would apply, as the Agreement between the parties (plaintiff's Exhibit 6) provides on Page 3 specifically that the only remedy of the defendant was to cancel the exclusive Franchising Agreement:

> "It is specifically agreed by and between the parties hereto that KIDDIE shall not be obligated to place orders for units as aforesaid, but upon its failure to do so, SOUTHLAND may terminate this Agreement as herein provided".

The parties had therefore agreed in advance as to the rights of rescission and termination on the failure to order units, although plaintiff was not obligated to place the order. In Finding of Fact 9, lines 22 to 27, the Court found that plaintiff did fully perform each and everything incumbent upon it to be performed, and that it was not in default of any of its contractual duties or obligations. Finding of Fact No. 8, lines 13 through 17, found specifically in accordance with the portion of the contract quoted above.

B. An Implied Agreement of the Contract

Between the Parties Was That Defendant Would Repay the Deposit.

After the Termination Letter between the parties was signed (plaintiff's Exhibit 9), plaintiff, in its letter of April 6, 1962 (plaintiff's Exhibit 10) demanded of defendant that it be allowed its credit of $250.00 per unit on a further franchise basis. On May 14, 1962, defendant's letter (plaintiff's Exhibit 11), objected to tying up an exclusive area that did not provide for future purchases, and offered to give a firm price on a certain number of units to be bought within a year. On May 16, 1962, plaintiff wrote that (plaintiff's Exhibit 12) they were rejecting the counter-proposal, and again demanded the Franchise Agreement which would give plaintiff the opportunity to recover the $19,950.00 credit and deposit. That same letter further stated that such an arrangement would "obviate the necessity of having to make a demand for the return of $19,950.00 in one lump sum".

On May 31, 1962, defendant sent its letter (plaintiff's Exhibit 13) to plaintiff granting a special sales price at a reduced rate for a period

of eighteen (18) months for the 80 units. The letter also provided that in the event defendant made any sales during the 18-month period, it would pay the sum of $250.00 per unit, or the difference between the selling price and $1245.00 per unit, whichever was the greater. This sales price and remittance would have terminated when defendant had paid back $20,000.00 (Note: The extra $50.00 is unexplained and irrelevant), or when the 18-month period had expired, whichever would have been sooner.

Both parties to the foregoing Letter acknowledged and agreed that plaintiff still had its credit of $19,950.00 which was due back to it. Plaintiff solicited defendant for method of repayment, tied to reduction of purchase price, which as plaintiff stated, would eliminate the necessity of having to make a demand for the entire amount in one lump sum. Rather than pay the money back in one lump sum, defendant agreed to a Franchise Agreement and sales over an extended period as a method by which plaintiff could recover the deposit owed to it. The Franchise Agreement did not accomplish the pay-back, which was only a method of repayment, and was not a

release or forfeiture of the entire sum. In other words, the sum of $19,950.00 was due and owing when the method of payment was agreed upon, but the agreement did not extinguish the liability to pay. At the very least, equity under the theory of money had and received would require the repayment.

See Keller v. Hicks, 22 Cal. 457; Bennett v. Superior Court, 218 Cal. 153 21 P 2d 946.

Where monies are deposited under a condition of future performance, and where the agreement and the condition are not fulfilled, the deposit should be refunded in full.

Cherry v. Hayden, 100 Cal. App. 2d 416 223 P 2d 878; Van Hoosen v. Briscoe, 85 Cal. App. 746 259 P 1115.

A contract is either expressed or implied. Section 1619 Civil Code of the State of California (All references to Code provisions are those of the State of California).

An express contract is one the terms of which are stated in words (Section 1620 C.C.) , and an implied contract is one the existence of terms of which is manifested by conduct (Section 1621 C.C.).

An implied contract is one that is inferred from the conduct, the situation, or mutual relation of the parties and enforced by the law on the ground of justice. The making of an agreement may be inferred by proof of conduct as well as by proof of the use of words.

Grant v. Long, 33 Cal. App 2d 725 92 P 2d 940; Jennings v. Bank of California, 79 Cal 323; 21 P 852; Dunham--Carrigan & Hayden v. Rubber Company, 84 Cal. App 669 258 P 663.

In general, an implied contract in no less degree than an express contract must be founded upon ascertained agreement of the parties to perform it, the substantial difference between the two being in the mere mode of proof by which they are to be respectively established. The law will imply that a party did make such a stipulation, as under the circumstances disclosed, he ought, upon the principles of honesty, justice and fairness to have made.

Grant v. Long, supra; Smith v. Moynahan, 44 Cal 53.

The cardinal rule in the construction of contracts is that the mutual intention of the parties as exhibited by their language, acts and conduct shall

govern. It is the objective thing manifestation of mutual consent which is essential. The law imputes to a person the intention corresponding to the reasonable meaning of his language, acts and conduct.

Crocker Company v. McFadden, 148 Cal App. 2d 639, 307 P 2d 429.

An inference that an agreement was in fact made may be based upon proof of conduct as well as upon proof of words.

Rankin v. Miller, 179 Cal. App 2d 133 3 C. Rptr. 496.

By their exchange of letters and by their conduct the parties have agreed that defendant would in effect repay to plaintiff deposit that was credited to him. In fact, it was the express intent of the parties to provide for the repayment of the sum and to recognize the indebtedness. The letters exchanged and referred to above, in the course of conduct subsequent to the termination of the original Franchise Agreement accomplished two separate things:

1. It acknowledged that upon termination of the original Franchise Agreement, the amount on deposit was not forfeited, surrendered or waived, but in

reality existed as a legal obligation of defendant;

2. If there had been any doubt as to how the $19,950.00 deposit was to be satisfied, the parties entered into a new and further Agreement in which a method of repayment was devised.

As to the foregoing facts concerning the arrangements of the parties after the termination of the original Agreement, there is no dispute and no evidence to the contrary was introduced. The Court's Finding of Fact No. 11 likewise outlined the course of events and the subsequent Agreement of the parties.

C. Allowing Defendant to Retain the Deposit of $19,950.00 Would be to Unjustly Enrich Him.

In Rodriguez v. Barnett, 52 Cal. 2d 154; 338 P 2d, 907, an escrow was opened for the purchase of real property wherein the buyer was not required to proceed unless he was satisfied with the subdivision map to be obtained. He had made a $1500 deposit towards the purchase. The buyer chose not to proceed thereafter, over the objections of defendant-seller and reclaimed his deposit. The California Supreme Court stated:

"The Court found that the plaintiffs had

> not refused or failed to perform any of the terms of the written Agreement; the finding is supported by the record. The plaintiff's withdrawal was made pursuant to the express provisions of the Agreement; it was therefore definitely implied in the Agreement that the defendant consented in advance to such withdrawal. Rescission extinguishes a contract. . .and requires each party to return whatever he has received as a consideration thereunder . . . as a matter of law, the plaintiff would therefore be required to return the $1500 deposit to the plaintiff upon rescission".

The District Court recognized this equitable principle of unjust enrichment as a justifiable claim by plaintiff when stated on page 5, lines 24 through 29 of his Memorandum of Opinion:

> "Plaintiff urges that defendant would be unjustly enriched if allowed to keep the credit item. Although we assume this position to be correct, the question would be, did defendant get more than fair compensa-

> tion for injury received? The burden is on plaintiff to prove how much the said credit exceeds the vendor's (defendant's) damage".

Therefore, in the Trial Court's Findings was the recognition of unjust enrichment, qualified by the Court's opinion that the plaintiff had proved that the credit which would otherwise be returned was offset by damages suffered by defendant. This statement of the Court is the gravamen of the error committed below.

The Court has assumed that a set-off for damages is allowed to the defendant, although plaintiff has not in any way breached a duty or obligation. Such is clearly not the law. See Rodriguez v. Barnett, supra.

In Gonzalez v. Hirose, 33 Cal. 2d 213, 200 P 2d 793, the Court stated the proposition that relief against the forfeiture should be granted in the absence of a breach of duty. In that case the Court found in effect that no proper Notice of Default was given and that as a matter of equity there was no default and that therefore the defendant was entitled to full

equitable relief without set-off. The basic equitable principle is set forth again in Bedel v. Barber 80 Cal. App. 2d 806 182 P 2d 591, wherein it is stated that the equitable consideration for diminution of a claim refund is the failure of the claimant to perform some contractual obligation.

The cases cited herein stand clearly for the proposition that plaintiff is entitled to a refudn without offset or dimunition when he has not violated or breached a contractual duty or obligation. We reiterate that the Agreement of the parties, dated November 15, 1961, which is plaintiff's Exhibit 6 expressly provided that plaintiff was not obligated to order any additional units, and that the only remedy for failure to order was cancellation of the exclusive Franchise Arrangement.

The Court also made its Finding of Fact No. 9 that plaintiff fully performed each and everything incumbent upon it to be performed under the terms of this Agreement with defendant, and plaintiff was not in default of any of its contractual duties or obligations.

D. The Trial Court Erroneously Interpreted and Applied The Holdings

in Major-Blakeney Corp. v. Jenkins, 121 Cal. App. 2d 325 263 P 2d 655; *and Baffa v. Johnson, 35 Cal. 2d 36 216 P 2d 13*.

In the *Major-Blakeney* case, plaintiff-purchaser contracted to buy ten (10) lots for $6700. A $1500 deposit was paid into escrow, the balance being due January 1, with time of the essence. January 1 and 2 were holidays, and plaintiff failed to pay on January 3. Hence Defendants were entitled to terminate the contract on January 6, that is, there was a violation of the condition precedent, and no evidence of waiver. But restitution may be given the purchaser who is able to show that the fault was not willful, fraudulent or grossly negligent, and that his prior payments exceed the damage suffered by the vendor (See Civil C Sec. 3275). In the *Major Blakeney* case therefore, plaintif was two weeks late as a result of the unexpected failure of his money source, and his down payment of 30% of the purchase price was too large an amount for retention as liquidating damages. The Court in that case specifically held that plaintiff was in default and that the contract

was no longer in force. Therefore, Section 3275 came into play because by its terms it affects the situation where a party to an obligation incurs a forfeiture or a loss in the nature of a forfeiture "by reason of its failure to comply with its provisions".

In Baffa v. Johnson, supra, plaintiff brought an action to recover a down payment of $5,000 made under a written contract in which he agreed to buy defendant's cocktail lounge for $93,000. The contract of purchase provided that if the buyer failed to deposit additional cash required in escrow, the sellers would retain the $5,000 in liquidated damages. The finding of the Trial Court was that defendants-sellers performed all that was required of them under the contract, and that plaintiff-buyer refused to open an escros and abandoned the contract. Plaintiff appealed from a Judgment entered in favor of the defendants. The defendants in that case sought to retain the $5000 under the provisions of Glock v. Howard & Wilson Colony Company, 123 C 1 55 P 713, which established the principle that a vendor may retain payments as an alternative remedy to an action for damages for breach of the contract to purchase real property.

The Supreme Court, clearly overruling the *Glock* rule, stated that a defaulting vendee may recover part payments after further performance under the contract has terminated if he proves facts justifying relief under Civil Code Section 3275. As in the *Major Blakeney* case, the plaintiff seeking the recovery of his down payment was clearly in default of his obligation, and the Supreme Court denied the return of the $5,000 down payment because plaintiff failed to prove that defendants' damages were less than the amount he had paid.

Clearly, the two cases are not authority for the instant litigation. Plaintiff seeking recovery of his deposit was not in default of any obligation or duty under his agreement with defendant, and the Trial Court so found (Finding of Fact 9). Section 3275 of the Civil Code presupposes that the party seeking relief is in default.

McNulty v. Lloyd, 149 Cal. App. 2d 307 P 2d 706;

Hayward Lumber v. Construction Products, 117 Cal 221, 255 P 2d 473;

Barkis v. Scott, 34 Cal. 2d 116, 208 P 2d 367

The application of the rule of CC § 3275 culminated in the leading case of *Friedman v. Rector of St. Mathias Parish*, 37 Cal. 2d 16 230 P 2d 629, which held that a defaulting vendee under a contract of purchase for real estate would be entitled to be repaid

its down payment on the property. We again emphasize that the basis of decision in the Friedman case was that the vendee was in default. The Supreme Court of California reasoned that if the only damage provision which applied was Section 3275 that restitution must be denied, but that this provision of the Civil Code taken with the other laws and policies against penalties and forfeitures was not the only alternative. To permit in effect punitive damages merely because a party had only partially performed his contract before his breach was inconsistent with Section 3294 of the Civil Code (limiting the right to exemplary damages), and Section 1670 and 1671 of the Civil Code (dealing with liquidated damages). Such penalties cannot reasonably be justified as punishment, even for one who wilfully breaches his contract. See Civil Code Section 3249, which expresses the policy of the law against the allowance of exemplary damages for breach of contract regardless of the nature of the breach. Furthermore, Section 3369 of the Civil Code provides that neither specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case. See also Harriman v. Tetik, 56 Cal 2d

805, 17 Cal Rptr. 134, wherein theCourt, again citing Friedman, stated that even a wilfully defaulting purchaser of real property could recover consideration paid to the extent he could show it exceeded the seller's damages. This principle extends beyond real estate transactions, and applies to a variety of situations to avoid unjust enrichment.

If indeed a forfeiture was to be declared by the acts of plaintiff, it would have occurred upon termination of the arrangements between the parties in April, 1962; however, the parties, and particularly defendant, recognized the right of plaintiff to recover his deposit through an exchange of correspondence referred to above. This exchange of correspondence resulted in the granting to plaintiff of a franchise to continue to sell the units, and a method by which plaintiff would be restored his deposit. In such circumstances, any possible forfeiture or claim of offset was waived by defendant. Forfeitures are abhorred, but waivers are favored. Churchill v. Kellstrom, 58 Cal. App. 2d 84; 136 P 2d 602. Forfeitures are not favored in the law, and any inconsistent acts or dealings by the party claiming a forfeiture will be regarded as a waiver thereof. Haserot v. Keller,67 Cal. App. 659,228 P 383.

In cases where plaintiff was not in default, the California Supreme Court unhesitatingly orders a

total refund. See Rodriguez v. Barnett, supra, and Gonzalez v. Hirose, supra. Therefore, the Court's legal conclusion that plaintiff had the burden of proving that defendant's damages were less than the amount of deposit was incorrect because an element of the application of such law was missing, to-wit, the finding of a breach of obligation by the plaintiff. Clearly, the plaintiff, by the findings of the Court and the evidence presented at the Trial was not in default in any of its obligations, and Section 3275 of the Civil Code did not apply. The rules of law in Gonzalez and Hirose did apply, which the Court refused to apply in the rendering of his judgment.

CONCLUSION

The Trial Court made Findings of Fact sufficient to sustain plaintiff's claim for a full refund of the deposit, and in fact compelled such a finding. The Findings were, briefly, that defendant held the sum of $19,950.00 for the benefit of plaintiff, and that defendant was obligated to pay said sum to plaintiff; that plaintiff fully performed each and every obligation incumbent upon it to be performed under its contract with defendant, and that plaintiff was not in default or in breach of any of its agreements; that

the only remedy for failure to order additional units beyond the first 100 was the right of the defendant to terminate the exclusive franchise given to plaintiff. The Trial Court misapplied these facts by erroneously construing the Major Blakeney and Boffa decisions to mean that even though a plaintiff is not in default he must nevertheless sustain the burden of proving the extent of defendant's damages. The California Supreme Court cases of Gonzalez and Hiroz clearly are contradictory to such finding, as such principle is applicable only when the claimant is in default. The fact that defendant may have suffered damages is irrelevant and immaterial if the damages were not caused by the breach or default of plaintiff.

WHEREFORE, plaintiff prays that Judgment of the District Court entered in favor of Defendant-Appellee be reversed, and that this cause be remanded with instructions:

(1) That the Trial Court enter Judgment in favor of plaintiff in the amount of $19,500.00;

(2) For plaintiff's costs of suit incurred;

(3) For such other and further relief as to this Court may seem just and proper.

Respectfully submitted,

SLAVITT, EDELMAN AND WEISER

By Herbert M Weiser
HERBERT M. WEISER

Attorneys for Appellant.

CERTIFICATE

I hereby certify that in connection with the preparation of this Brief I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with those rules.

Herbert M Weiser
HERBERT M. WEISER

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
COUNTY OF LOS ANGELES)SS.

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within action; my business address is:

8201 Beverly Boulevard
Los Angeles 48, California

On October 18, 1965, I served the within APPELLANT'S OPENING BRIEF on the interested parties in said action, by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, in the United States mail addressed as follows:

MAGDLEN AND BLACKSTOCK
336 Security Building
510 South Spring Street
Los Angeles, California 90013

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on October 18, 1965, at Los Angeles, California.

Herbert M Weiser